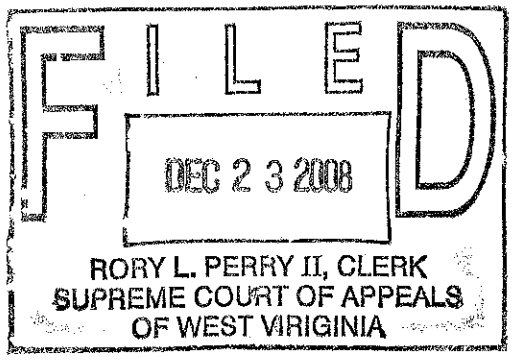
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

PRINCETON INSURANCE AGENCY, INC.
AND KEVIN WEBB, (PLAINTIFFS BELOW) **APPELLEES,**



vs.) **DOCKET NO. 34498**

ERIE INSURANCE COMPANY, ERIE INSURANCE
PROPERTY AND CASUALTY COMPANY,
ERIE FAMILY LIFE INSURANCE COMPANY,
ERIE INSURANCE EXCHANGE, ERIE INDEMNITY
COMPANY, CHARLES MICHAEL FLETCHER, AND
CARL OLIAN, II, (DEFENDANTS BELOW) **APPELLANTS.**

FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
(THE HONORABLE WILLIAM SADLER)

APPELLEES' BRIEF

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RESPONSE TO THE STATEMENT OF THE CASE

This case is an antitrust case which involved an unlawful restraint of the sale of insurance. Both the *West Virginia Unfair Trade Practices Act* and the *West Virginia Antitrust Act* are directly at issue. Since most people and businesses in this state must purchase insurance, and since virtually every person and every business in this state is a consumer of goods and services, this Court's opinion will directly or indirectly affect every person and business in this state. People and businesses have the right to exercise the freedom of choice in the selection of products while taking into consideration the prices thereof, without such choices and options being suppressed by greedy anticompetitive conduct designed to increase profits. The need for the freedom of choice is underscored with the need to purchase essential products such as food, homes, automobiles, and the like, many times on constrained budgets. For consumers who own automobiles or financed homes, automobile insurance or homeowner's insurance are mandatory expenses.

Because of the significance of this case, this brief (like the appellants' brief) consumes the 50 page limit established by this Court in its rules. Substance cannot be sacrificed for brevity. *This brief cites more facts and law than the Response in Opposition to the Petition for Appeal.*

RESPONSE TO THE NATURE OF THE RULINGS BELOW

The appellants claim that the issues in this case are whether the record supports an effect on competition, whether there was any "conspiratorial" anti-competitive conduct, and whether the antitrust act can be extended "beyond the borders of our state so as to regulate competition in neighboring jurisdictions." The appellants claim that the circuit court "effectively answered each of these questions in the affirmative." [Appellant's brief, page 6] The appellants are incorrect in their summary because one of the above issues was not raised in the circuit court.

During the proceedings below, the appellants challenged whether there was a conspiracy or combination (which is required by the antitrust acts). They also argued that there was no effect on competition; however, the appellants never asked the circuit court to determine whether any claims were barred because the antitrust act cannot be extended "beyond the borders of our state." This Court may review the appellants' motions to dismiss, the motions for summary judgment, the motions for judgment at the close of the cases in chief, and the motion for judgment as a matter of law, to see that only two of the three "issues" summarized on page 6 of their brief were preserved for appeal.

Even more alarming is that the appellants now claim as an issue for the first time on appeal that Kevin Webb's claims were based on commerce in Virginia, but, the appellants told the circuit court that all insurance policies were written in West Virginia—the evidence proved that he wrote policies of insurance to Virginia residents at his agency ***only*** in West Virginia. The appellants' position on appeal is inconsistent with their position in the circuit court.

INACCURACIES AND OMISSIONS IN THE STATEMENT OF FACTS

A. THE CLAIMS ASSERTED

On page 9 of the appellants' brief, they claim that the circuit court necessarily concluded that the relevant Erie insurance companies severed their relationship with Kevin Webb in Virginia, but the circuit court never made such a conclusion. ***It was an uncontested fact in the proceedings in circuit court that Kevin Webb and Princeton Insurance Agency, Inc. had only ONE agency location (and it was in West Virginia), and that all policies of insurance were written at that location in West Virginia.*** The citations of evidence in the record to prove the above is contained at pages 23 through 27 of this brief, and are not restated at this juncture.

B. THE PARTIES

Princeton Insurance Agency, Inc., a West Virginia Corporation, and Kevin Webb, were "independent agents" and not "captive agents," and therefore, they could sell insurance for multiple insurance companies. (T.R. 241) The Erie companies maintained their agents as "independent agents." (T.R. 240, 980, 981) Customers benefited from the *competition.* (T.R. 240) The Erie companies were the anchor companies in Princeton Insurance Agency which had been owned by Frazier Webb since the 1980's. (T.R. 205, 243)

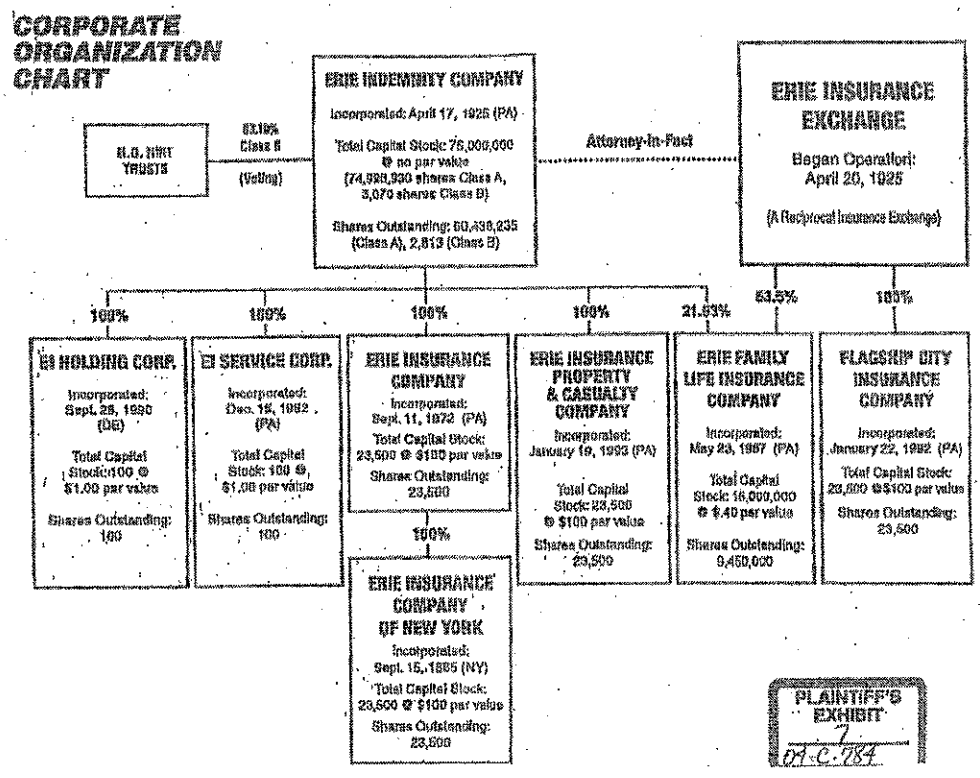
In 2002, Rita Kidd approached Kevin Webb and Frazier Webb (Kevin's father), and offered to set up a separate insurance agency (ultimately Princeton Insurance Associates, Inc.) to sell insurance for State Auto Insurance Company; Rita Kidd would be a stockholder in this new agency, *and she would transfer her book of business with State Auto to this new agency.* (T.R. 243-247) She did not want to transfer her State Auto book of business to Princeton Insurance Agency, Inc. because she wanted to ***own*** a part of, and manage, the agency in which that book of business was to be placed. (T.R. 246) Mr. Webb did not want her to own any interest in Princeton Insurance Agency, Inc., although she would sell insurance for it and the Erie insurance companies. (T.R. 244, 574, 575) Rita Kidd did transfer (rewrite) her State Auto book of business to Princeton Insurance Associates. (T.R. 575) Princeton Insurance Agency could have sold for both State Auto and the Erie companies, and such would not have violated the Erie agency contracts. (T.R. 245)

All of the Erie insurance companies are corporations, except Erie Insurance Exchange is a "reciprocal" entity where policyholders exchange contracts and promises to one another agreeing to indemnify each other for insured losses sustained. (Plaintiffs' Exhibits 1-6; T.R. 218-220). Each Erie Insurance Exchange policyholder is an "owner" of the company, but each signs

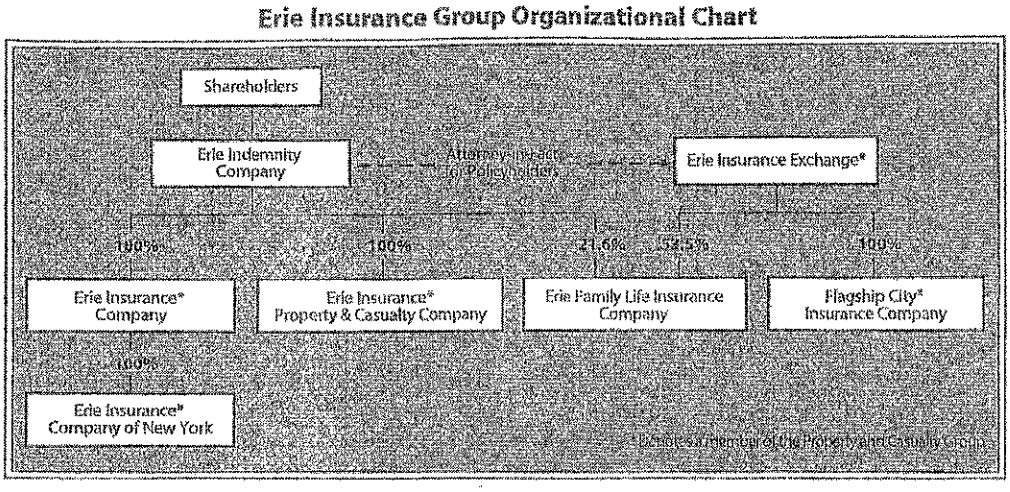
a subscriber agreement allowing Erie Indemnity to act as their attorney-in-fact to manage the collection of premiums and issuance of policies. (T.R. 219, 220; Plaintiffs' Exhibits 1-4, 6)

Three (3) of the Erie insurance companies named as parties to this case were not wholly owned subsidiaries of any other party; they include Erie Indemnity Company, Erie Insurance Exchange, and Erie Family Life Insurance Company. (Plaintiffs' Exhibit 7) Charles Michael Fletcher and Carl Olian were employees of only Erie Indemnity Company; Mr. Fletcher was the Parkersburg branch manager and Carl Olian was a district sales manager. (T.R. 747, 755, 756)

The appellants claim that a chart in their brief at page 13 "replicates, in simplified version, Plaintiffs' Exhibit 7 as presented at trial" (ftnt 28), *but their chart is materially different because it combines the ownership of two of the companies in Erie Family Life Insurance Company at 75.13% which was* ***not*** *the evidence the jury received.* Compare Plaintiffs' Exhibit 7:



The following is a duplicate of the chart also presented by Erie Indemnity Company in its 2003 annual report which was Plaintiffs' Exhibit 1 during the trial:



Neither chart presented to the jury combined the ownership of two of the Erie companies in the Erie Family Life Insurance Company because such was not the way the Erie insurance companies treated the ownership. Erie Indemnity Company owned only 21.6% of Erie Family Life Insurance Company, and therefore, the life insurance company was not even a subsidiary of Erie Indemnity (because there was less than 50% ownership). At most, the life insurance company was an "affiliate" of Erie Indemnity.

C. THE MISCONDUCT

During the 2002 agency review for the most profitable, best performing year of Princeton Insurance Agency, Inc. in many years, the Erie insurance companies, acting through Charles Michael Fletcher, Carl Olian, and others, determined that they would conduct an agency visit and **"...address their writings in other companies (State Auto)."** (Plaintiffs' Exhibits 24, 25, 38; T.R. 390, 904, 906) The Erie insurance companies were opposed to competing with State Auto and Princeton Insurance Associates for the sale of insurance to new customers, and they acted to

influence Princeton Insurance Agency and Kevin Webb to place the insurance customers with the Erie companies instead of State Auto. Although Carl Olian never testified at trial, these important facts were confirmed by an April 1, 2003, report he wrote which states in part:

> "Kevin told me that State Auto is ***very competitive*** with Erie especially on Homeowners risks. He admits that the coverages are not always as good as ours but, ***the premium is significantly better most of the time*** and the client doesn't care. I asked him how is the client given this choice and Kevin told me that they ***offer both to the client and let them make the decision. I told him that I really didn't think this was fair*** because I don't know how well the differences in coverages are actually being explained and, in 99% of the cases when there is a significant difference in price, most people are going with price alone unless the agency is selling on something other than price. He said they are but I have my doubts.
>
> * * *
>
> ***I told him that regardless of what corporation exists or how many of them there are, it doesn't eliminate the concern I have that business is being placed with them and not us and that is exactly how Home Office and everyone else would look at this.***
>
> * * *
>
> I told him that I was concerned and that everyone would be. ***I told him that Mike and I would be getting together with him soon on this as it is only fair to him to let him know where he stands with us and the sooner the better.*** Although, by bringing on State Auto and our results with his agency through March does not make the situation look good.
>
> * * *
>
> ***Mike, it's my thought that you and I meet with Kevin a.s.a.p. to determine this agency's future with our company."*** [Plaintiffs' Exhibit 12; T.R. 252, 255-257, 262, ***emphasis added.***]

Kevin Webb originally provided customers with the information regarding the coverages and premiums offered by each company (Erie companies and State Auto) so that the customers could make an *informed choice*. (Plaintiffs' Exhibit 12; T.R. 258, 259, 261) State Auto had *lower premiums* mainly because the Erie companies had raised their underwriting and reunderwriting guidelines in the AWARE program implemented in early 2003 which *raised premiums*. (T.R. 258-261, 857, 858; Plaintiffs' Exhibit 12) Prior to May 1, 2003, more business was placed with State Auto because of the conduct of former branch manager Jerry Murphy

which caused Kevin Webb to strictly apply the underwriting guidelines and focus on re-underwriting, resulting in reduced sales for the Erie companies. (T.R. 505, 506, 554) Many customers obviously liked the less expensive State Auto premiums, and some cancelled their Erie policies. (T.R. 854-858) **The appellants' statement in their brief at page 17 that they did not know of the "move" or shift in policies to State Auto prior to the trial is incorrect.** On August 12, 2003, Mr. Fletcher and Mr. Olian discussed this very fact by email, and indicated that they had also discussed this fact in May 2003. (See Plaintiffs' Exhibit 14, third bullet point)

On May 1, 2003, both Mr. Olian and Mr. Fletcher met with Kevin Webb at his office and had a discussion about the "relationship" between the Erie insurance companies and Princeton Insurance Agency (and Kevin Webb), and the desire for more production. (Plaintiffs' Exhibit 13; T.R. 268-271, 761, 762, 766, 767, 907) Mr. Webb told them that there were no production commitments to State Auto. (Plaintiffs' Exhibit 13; T.R. 269)

In an effort to "push" sales to the Erie companies, they asked Mr. Webb to "direct" or place the insurance customers with the Erie companies, and not with the competitor, State Auto, notwithstanding a difference in premium that would have saved customers money with State Auto. (T.R. 206, 261, 262, 384, 981, 988) ***Discussing Plaintiffs' Exhibit 12 (partially quoted above), Kevin Webb testified that Carl Olian told him to place the sales with the Erie companies, and not State Auto, REGARDLESS OF THE HIGHER PREMIUMS!*** (T.R. 258, 259, 261, 262) Mr. Olian never testified at trial, and thus never rebutted the above testimony.

Mr. Webb testified that the Erie companies had raised their underwriting guidelines so high (which increased their premiums), that he placed customers who complied with those guidelines with the Erie companies, *unless* the customers complained or inquired of other companies, and *then* he would quote other companies. (T.R. 380, 381)

On August 12, 2003, Charles Michael Fletcher sent an e-mail to Carl Olian and regional sales manager Terry Hamman. In discussing the Princeton Insurance Agency agent review update, Mr. Fletcher gave further insight to the attitude regarding the competition with State Auto:

> "May: 17 new apps. June: 29 new apps. July 25 new apps. **Not bad, but I just can't help but to feel that State Auto is getting the cream."**
>
> * * *
>
> Ask him what is going to change between now and Agent Review. There are five months left this year and he can still have a positive effect not only on his 2003 numbers, but also on his agency's relationship with Erie. **Find out what he's doing with State Auto by asking for a YTD production report. If the meeting doesn't go well or if we don't get a good gut feeling, then I would recommend termination immediately."** (Plaintiffs' Exhibit 14, T.R. 273, 274, 275, **emphasis added)**

On October 10, 2003, Mr. Fletcher sent an e-mail to Kevin Webb requesting him to produce the State Auto production reports for May, June, July, August, and September of 2003. (Plaintiffs' Exhibit 15) Those reports contained both the new business that walked into Princeton Insurance Associates off of the street *and the rewritten book of business of Rita Kidd that she brought from Murphy Insurance Company to the agency.* (T.R. 287, 288, 1070, 1071)

Rita Kidd taught insurance classes and was qualified as an expert. (T.R. 572, 584, 613) She testified that the production reports and information on them was ***not*** information that should be produced to an insurance company that has been with an agency for a significant period of time; the track record with a company is typically produced to a new insurance company coming into the agency, but not vice versa. (T.R. 595-597, 610, 614, 615) The reports also contained confidential client information. (T.R. 277-279) Rita Kidd instructed Mr. Webb ***NOT*** to give Mr. Fletcher the State Auto production reports for Princeton Insurance Associates. (T.R. 602-604)

On October 15, 2003, Mr. Fletcher met with Kevin Webb at the Bob Evans restaurant. Although Mr. Webb refused to produce the production reports from State Auto, ***he did concede***

to the pressure by writing the production information (Princeton Insurance Associates/State Auto) down on a napkin and tendering it to Mr. Fletcher. (T.R. 287, 921, 922) To comply with their production demands and attempt to subdue the threat of termination, Kevin Webb testified that after factoring out Rita Kidd's State Auto customers from her prior agency (that were rewritten with Princeton Insurance Associates), the majority of ***new*** customers coming into the agencies were placed with the Erie insurance companies and not State Auto. (T.R. 287-289) This shift was corroborated by the increase in Erie applications to which Mr. Fletcher commented, **"Not bad..."** [Plaintiffs' Exhibit 14] In fact, the shift of customer placement favoring the Erie companies was so dramatic, that according to Erie company reports, *the loss ratio of the agency dropped eleven (11) points in just sixty-one (61) days from July 1, 2003, to August 31, 2003!* (T.R. 850-853) This did not satisfy Mr. Fletcher and the Erie companies.

On October 21, 2003, Mr. Fletcher left a voice mail on Kevin Webb's answering machine stating that the Erie companies were **demanding** the State Auto production reports. (Plaintiffs' Exhibit 39; T.R. 925, 926) A few days later, he apologized for using the word "**demand,**" but still "requested" the State Auto production reports. (Plaintiffs' Exhibit 17; T.R. 923)

On November 5, 2003, Kevin Webb wrote to Mr. Fletcher and told him that the State Auto production reports would not be produced because to do so was improper. (Plaintiffs' Exhibit 19) Notwithstanding the letter, on November 20, 2003, Mr. Fletcher called Mr. Webb and in summary, told him that he should produce the State Auto production reports for Princeton Insurance Associates if he wanted Princeton Insurance Agency to keep its contracts with the Erie companies. (Plaintiffs' Exhibit 20; T.R. 308-312) Being a former police officer, Kevin Webb knew to record that telephone conversation (and others) for his protection. (T.R. 203, 204, 267) The taped conversation was played for the jury, and it was admitted as Plaintiffs' Exhibit 20.

On December 16, 2003, Carl Olian called Kevin Webb (it too was recorded) and told him that without the State Auto production reports, they were going to be ***"hard pressed to convince anybody (at home office) that the majority of that new (insurance) business that walks into that door is not going to State Auto verses us (Erie companies)."*** (Plaintiffs' Exhibit 23; T.R. 368, 369) Kevin Webb later told Mr. Olian that ***"I give Erie what Erie asked for...*** I give him the premium business that they asked for."*** (Plaintiffs' Exhibit 23; T.R. 369-371) Mr. Webb further told Mr. Olian that in prior years he had never been requested by the Erie companies to produce production reports from any other insurance company, and then he asked Mr. Olian why the reports were being requested at that time. (Plaintiffs' Exhibit 23; T.R. 373) Later in his response, Carl Olian told Mr. Webb that without the information (the State Auto production reports), the future of the agency (with the Erie companies) looked "bleak." (Plaintiffs' Exhibit 23; T.R. 377. Note, the trial transcript shows "unclear", but a court reporter transcribed the conversation in Mr. Olian's deposition of October 4, 2006; the use of "bleak" in that tape recorded conversation is transcribed at pages 150 and 151 of the Olian deposition.) The tape recorded conversation was played for the jury.

The Erie insurance companies terminated their agency contracts with Princeton Insurance Agency and Mr. Webb with a letter dated March 12, 2004. (Plaintiffs' Exhibit 27; T.R. 403, 404) Most customers who had been with the Erie companies more than four years for homeowners and two years for autos were kept by the Erie companies and managed at the Parkersburg branch office; those customers who had been with them for less time were "non-renewed." (T.R. 409, 410) Some customers, such as Kevin Webb's uncle "Buck" Vaughn and Harold Buckner (a magistrate), were illegally "non-renewed" and had to be reinstated after complaints to the insurance commissioner. (T.R.530-533; Defendants' Exhibit 1).

D. THE AGENCY TERMINATIONS WERE NOT DUE TO POOR PERFORMANCE

Implementing the AWARE program in 2003 caused the guidelines to increase, resulting in people either canceling because of higher premiums, or not qualifying at all. (T.R. 854-858)

Notwithstanding the appellants' claims of decreasing performance, ***the total premium volume of the agency increased in 2003 by the sum of $33,976.00—it was $1,799,455.00 at the end of 2002, but was $1,833,431.00 at the end of 2003.*** (T.R. 528) This represented *more* premiums with *less* insurance policies in effect, and proved that Mr. Webb had reunderwritten his business, as had been requested of all agents because of the AWARE program. (T.R. 529) ***KEVIN WEBB DID WHAT THE ERIE COMPANIES ASKED HIM TO DO—GET MORE PREMIUMS WITH LESS RISK-- AND NOW THEY CLAIM POOR PERFORMANCE.*** In 2003, there was an increase in the number of homeowners insurance policies. (T.R. 500) The above increase in premium volume and number of personal property policies sold occurred in spite of the devastating loss of Mr. Webb's key producer, Donetta Anderson, who was killed in a car wreck in October 2003, and the injury of his father who broke his back in an accident in September 2003 and was placed in a Roanoke hospital. (T.R. 350-352, 521)

The statements of Charles Michael Fletcher to Kevin Webb on November 20, 2003, proved that the appellants really wanted to keep Kevin Webb and Princeton Insurance Agency as agents, but it was contingent upon the production reports for State Auto/Princeton Insurance Associates being given to them. (T.R. 309-312) After already making two requests for those production reports prior to November 20, 2003, Mr. Fletcher made yet a third request:

> **"I am not bullshitting you. It is our best interests at Erie Insurance to keep this contract in force. I believe that from the bottom of my heart.** ***But I also believe that I need your help.*** * * * Well, I guess I'm just gonna say again, this is my **third** request, I promise if ya ... if you say no, I'm not gonna bug you anymore." [Plaintiffs' Exhibit 20; T.R. 312, ***emphasis added***]

In an effort to apply pressure on Kevin Webb and Princeton Insurance Agency, the Erie companies changed their loss "reserves" by ***increasing*** them in 2003 by approximately $250,000.00 for losses sustained in prior years; this caused the loss ratios for Princeton Insurance Agency to skyrocket in 2003. (T.R. 546-550, 1078) In essence, loss reserves that permitted a "profitable" year in 2002 became crushing in 2003 because of the increase, ***but in January 2004, the increase disappeared from the total!*** (T.R. 546-550) The above was confirmed by a December 31, 2003, total from Defendants' Exhibit 5 that claimed that the agency had a $1,450,772.00 five year loss, but one month later on January 31, 2004, ***when the agency purportedly had a 143% loss ratio for the month of January 2004, the five year loss decreased to $1,193,856.00*** (See Defendants' Exhibit 9, and compare it to Defendants' Exhibit 5) The above decrease of approximately $256,000.00 during a month where the loss ratio purportedly exceeded 100% (it was stated to be 143%) ***IS A MATHEMATICAL IMPOSSIBILITY!*** The appellants changed the reserves and the loss ratios to make them what they wanted them to be.

The appellants introduced Defendants' Exhibit 5 which was a December 31, 2003, year end summary of the agencies' performance, and it included "0" for life insurance policies sold, ***but on the December 31, 2003, year end report given to Kevin Webb and Princeton Insurance Agency (introduced as Plaintiffs' Exhibit 29), there were "3" life insurance policies written in 2003, not "0"!*** The Erie companies made the "numbers" be what they wanted them to be.

Although Mr. Fletcher claimed that Kevin Webb was not adequately "reunderwriting" the agencies' book of business (increasing the risk for established customers to obtain greater premiums), Carl Olian had written in the evaluation of Princeton Insurance Agency and Kevin Webb for the year 2003 (titled as the 2004 Agency Review) that the reunderwriting was "good," ***but Mr. Fletcher later changed it to "poor."*** (Plaintiffs' Exhibit 24, page 2; T.R. 390, 391, 961)

As indicated above, the increase in premiums with the decrease in the number of policies in force established that Kevin Webb was successfully reunderwriting his business.

Critical to corroborating all of the above is that it was proven that there were several other Erie insurance agencies in West Virginia which had less favorable "numbers" (i.e. loss ratios, etc...) than Princeton Insurance Agency and Kevin Webb, ***but they did not have their agency contracts terminated.*** (Plaintiffs' Exhibits 43A-43H; T.R. 1000-1015) Of course, they were ***not*** asked to produce "State Auto" information! (T.R. 977, 978)

On March 7, 2004, Carl Olian prepared an e-mail to summarize the information relied upon for the terminations and the e-mail established that the failure to produce the State Auto production reports and the insurance sales production given to State Auto (and not the Erie companies) played key roles in the termination of the agency contracts. (Plaintiffs' Exhibit 26; T.R. 400-402, 952) The Erie companies denied in requests for admissions that the failure to produce the State Auto production reports had any impact on the decision to terminate the agency contracts. (Plaintiffs' Exhibit 22; T.R. 359-363) Mr. Fletcher, the only defense witness who testified at trial, refused to admit that the failure to produce the State Auto production reports had ***any*** bearing or influence on the decision to terminate the agency contracts, even in the face of the Agency Review Form (Plaintiffs' Exhibit 25) and the Olian summary (Plaintiffs' Exhibit 26) which clearly stated otherwise. (T.R. 894, 895, 975) *The jury, with solid evidence, decided that their answers were untruthful!*

Without objection, Dan Selby was qualified as an "expert to present the economic loss in this case." (T.R. 671) He gave the jury a range for the damages from a combined low of $1,224,593.00 up to a combined high of $1,956,858.00. (Plaintiffs' Exhibit 35; T.R. 667-714) The jury assessed $1,411,209.00 in compensatory damages. (See the Verdict Form)

CONCISE RESPONSE TO THE ASSIGNMENTS OF ERROR

The first assignment of error stated on page 19 of the appellants' brief is out of order from that presented in their argument. This concise response correlates with their list on page 19.

1. **Antitrust Injury:** When viewing the evidence in a light most favorable to the appellees, they proved harm to competition and consumers, and that their business was damaged because of it. They proved that the appellants suppressed competition with State Auto/Princeton Insurance Associates by restraining their sales, which caused consumers to pay higher premiums.

2. **Subject Matter Jurisdiction for Kevin Webb's Claims:** The lower court had subject matter jurisdiction because Kevin Webb's case was a civil action at law with an amount in controversy exceeding $300.00; it made no difference which law was applied. His agency was located only in West Virginia, and all of his insurance sales, even to Virginia residents, occurred only in West Virginia. Mr. Webb's sales were commerce in West Virginia or activity which substantially affected commerce in West Virginia, and thus, the *West Virginia Antitrust Act* and *West Virginia Unfair Trade Practices Act* governed Kevin Webb's claims. Since all insurance sales were transacted in West Virginia, Kevin Webb and the appellants were required to comply with the West Virginia insurance statutes pursuant to **West Virginia Code 33-4-1.** This included compliance with the *West Virginia Unfair Trade Practices Act* which prohibited both Kevin Webb and the appellants from unreasonably restraining the business of insurance as stated in **West Virginia Code 33-11-4(4).** The appellants never contested the use of West Virginia law.

3. **Conspiracy, Combination, or Concerted Action Between the Erie Companies:** The Erie Indemnity Company, Erie Family Life Insurance Company, and Erie Insurance Exchange were not wholly owned subsidiaries of each other or a parent company. Therefore, under current

law, those three companies were capable of a conspiracy or concerted action. Two companies were publicly traded corporations, and one was a life insurance company. Due to significant regulation of insurance companies, they were separate economic entities with separate reserves.

4. Conspiracy, Combination, or Concerted Action with the Appellees: When viewing the evidence in a light most favorable to the appellees, they proved that the appellants coerced them to help unreasonably restrain the sales of State Auto and Princeton Insurance Associates.

5. Antitrust Damages: The *West Virginia Antitrust Act* permits a private cause of action for injury to business or property. Insurance agencies can be sold, and they have been valued and divided in court cases. There is no restriction in the statute which prohibits business or property damages premised upon lost future commissions or lost future profits.

STANDARD OF REVIEW

This Court "has historically favored supporting jury verdicts and will affirm a verdict, short of compelling reasons to set aside a verdict." **Pipemasters, Inc. v. Putnam County Commission, 218 W.Va. 512, 625 S.E.2d 274 (2005)** "Typically, when a case has been determined by a jury, the questions of fact resolved by a jury will be accorded great deference." **Id.**, citing **In re Tobacco Litigation, 215 W.Va. 476, 600 S.E.2d 188, 192 (2004)** Although this Court reviews the circuit court's decision to deny a motion for judgment as a matter of law *de novo,* "the same stringent decisional standards that control circuit courts are used" and the evidence must be reviewed *"in a light most favorable to the plaintiff."* **Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995)** Regarding a motion for a new trial, this Court reviews the circuit court's decision to deny same under an *abuse of discretion* standard and the factual findings supporting its denial are reviewed under a *clearly erroneous* standard. **Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995)**

SUBJECT MATTER JURISDICTION--KEVIN WEBB'S CLAIMS

The appellants' argument starts on a false premise. As the record cited below reflects, there has never been a "Virginia agency agreement," but there was insurance sold to Virginia residents in West Virginia pursuant to a West Virginia agency agreement. On May 11, 2005, the appellants filed a motion to dismiss certain individual plaintiffs, and they represented to the circuit court that they were **NOT** requesting the court to dismiss Kevin Webb as a party *"because Mr. Webb had a separate Agency Agreement with the defendants for business written in the state of Virginia."* Later, the appellants offered instructions of law premised upon the *West Virginia Antitrust Act*. Now for the first time on appeal, the appellants claim that the *West Virginia Antitrust Act* should not govern Kevin Webb's claims and consequently, the circuit court did not have subject matter jurisdiction. The appellants have confused the concept of subject matter jurisdiction with that of the choice-of-law. They have ***not*** assigned any error in the subject matter jurisdiction for Princeton Insurance Agency's claims.

I. SUBJECT MATTER JURISDICTION FOR THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA EXISTED BECAUSE THE CASE WAS A *"CIVIL ACTION AT LAW"* AND THE AMOUNT IN CONTROVERSEY EXCEEDED $300.00.

This court has established that subject matter jurisdiction exists as a matter of law:

> "A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description." **Perkins v. Hall, 123 W.Va. 707, 17 S.E.2d 795 (1941)**

This Court has made clear that "circuit courts are constitutional tribunals, having been created and provided for by the Constitution itself" and they are "expressly granted original and general jurisdiction of all matters at law". **Halltown Paperboard Company v. C.L. Robinson Corp., 150 W.Va. 624, 148 S.E. 2d 721 (1966).**

The subject matter jurisdiction of the circuit courts in West Virginia is defined in **Article VIII, § 6** of the **West Virginia Constitution**. Consider the following relevant portion:

> "Circuit Courts shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs exceeds $100.00 unless the value or amount is increased by the legislature;***Circuit courts shall also have such other jurisdiction, authority or power, original or appellant or concurrent, as may be prescribed by law."

The West Virginia legislature has in essence codified the provisions of the **West Virginia Constitution Article VIII, § 6** by implementing **West Virginia Code 51-2-2.** At the time this case was filed in 2004, the legislature had increased the jurisdictional amount in controversy from $100.00 to $300.00. See **West Virginia Code 51-2-2,** effective 2004.

While "subject matter jurisdiction" deals with a court's ability to hear a particular *type* of action or *"cases of that description"* (see **Perkins v. Hall, supra.**), the "choice-of-law" doctrine focuses on whether the law of West Virginia applies or the substantive law of another state applies. **W.Va. ex rel. Chemtall, Inc. v. Madden, 216 W. Va. 443, 607 S.E. 2d 772 (2004),** citing **Vest v. St. Albans Psychiatric Hospital, 182 W.Va. 228, 387 S.E. 2d 282 (WV 1989).** The circuit court had subject matter jurisdiction *even if the Virginia Antitrust Act applied*:

> "This state may choose, under principals of comity and the broad limits of the U. S. *Constitution*, to apply in its courts the substantive law of another jurisdiction, in accord with this state's choice-of-law rules. Another state may deny plaintiff's access to its own courts, but may not by that act deny access to the courts of West Virginia. **When there is a living cause of action *(even though itself a creature of Virginia law)*, venue is proper in a West Virginia state court, and West Virginia has personal jurisdiction over the defendant, the plaintiff may bring his claim before the state courts of West Virginia and be heard." Vest v. St. Albans Psychiatric Hospital, 182 W.Va. 228, 387 S.E. 2d 282 (WV 1989), *(Emphasis added)*.**

But even if the cause of action is premised upon another state's law, the jurisdiction of circuit courts in West Virginia is dictated exclusively by the Constitution and laws of the State of West Virginia because West Virginia is an independent and sovereign state. **Vest, supra, @ 285.**

Perhaps to summarize the concepts, this Court in **Vest** stated:

> "If a defendant has subjected himself to suit in West Virginia under this state's long-arm statute, and the plaintiff is a resident of West Virginia, ***we refuse to require the plaintiff to litigate his tort claim first before any tribunal in another state."*** **Vest v. St. Albans Psychiatric Hospital Inc., 182 W.Va. 228, 387 S.E. 2d 282, @ 286 (1989) (*Emphasis added*).

The circuit court had *personal jurisdiction* of the parties because: (a) Kevin Webb was a resident of Mercer County, West Virginia, (b) two of the appellants, Carl Olian and Charles Michael Fletcher, were West Virginia residents, and (c) all of the Erie companies were licensed or transacted business in West Virginia. See **West Virginia Code, 56-3-33.**

The circuit court had *venue* because acts in furtherance of the unlawful restraint of trade occurred in Mercer County, West Virginia and the Appellants transacted business there. Consider the **"VENUE"** statute within the *West Virginia Antitrust Act*:

> "Actions or proceedings under this article may be brought in the circuit court of any county in which an act on which the action or proceeding is based occurred, or in any county in which the respondent or defendant resides or transacts business." **West Virginia Code, 47-18-15.**

Kevin Webb's decision to allege and apply West Virginia law as the law to govern his claims was and is a "choice-of-law" issue, not an issue of subject matter jurisdiction. While the parties may not confer subject matter jurisdiction by agreement because it must exist as a matter of law, the choice-of-law must be raised before the circuit court because even if the choice-of-law was erroneous, it may be ***harmless error*** if there is no material difference between the law applied and the law that should have been applied. See **State ex rel. Chemtall, Inc. v. Madden, supra.,** citing **Phillips Petroleum Company v. Shutts , 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985).** Even if materially different, West Virginia law may be applied if West Virginia had *"a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."* **Id. @ 452, 781.**

II. THE APPLICATION OF THE *WEST VIRGINIA ANTITRUST ACT* AND *WEST VIRGINIA UNFAIR TRADE PRACTICES ACT* TO KEVIN WEBB'S CLAIMS WAS PROPER, AND THE EVIDENCE PROVED VIOLATIONS OF THOSE ACTS.

The appellants argue that in order to apply the *West Virginia Antitrust Act* to a case, there must be a "substantial" local effect or a "substantial" effect upon "trade or commerce" in West Virginia. Without comparing the West Virginia statute to other state statutes, they cite a standard from other states (specifically Tennessee) which requires a "substantial effect" on local commerce. **Freeman Indus., LLC v. Eastman Chemical Co., 172 S.W. 3d 512 (Tenn. 2005).** Their reliance on a standard used by some states instead of "ruling" precedent involving the *Sherman Act* is flawed since it eliminates one of the two standards applicable--"in commerce."

A. Courts must construe West Virginia's act in harmony with legal precedent interpreting the federal antitrust acts, and thus, there are two standards (and not only one) which permit application of the West Virginia act--"in commerce " or "substantial effect."

The *West Virginia Antitrust Act* is not redundant or superfluous to the *Sherman Act.* **Kessel v. Monongalia County Gen. Hospital, 220 W.Va. 602, 648 S.E.2d 366 @ ftnt 6 (2007)** Furthermore, "Congress has not pre-empted the field of antitrust law...Congress intended the federal laws to supplement, not displace, state antitrust remedies. (Multiple citations omitted)" **California v. ARC Am. Corp., 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86 (1989)**

The judiciary in West Virginia must *construe the West Virginia Antitrust Act in harmony with ruling judicial interpretations of comparable federal antitrust statutes pursuant to* ***West Virginia Code*** *47-18-16.* See **Kessel v. Monongalia County Gen. Hospital, supra,** citing **Gray v. Marshall County Board of Education, 179 W.Va. 282, 367 S.E.2d 751 (1988).** The United States Supreme Court has adopted two separate standards, either of which permits the application of the *Sherman Antitrust Act* to a variety of cases: the "in commerce" standard and the "effect on commerce" standard. Consider the following:

"It can no longer be doubted that the jurisdictional requirement of the Sherman Act may be satisfied under ***either*** the 'in commerce' ***or*** under the 'effect on commerce' theory." **McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242, 100 S.Ct. 502, 509, 62 L.E. 2d 441, 450 (1980).** ***(Emphasis added)***

In accord with **Kessel** and **Gray**, both standards applicable to the *Sherman Act* as per **McLain** should also apply to the *West Virginia Antitrust Act*, with a claimant being required to prove only one standard. The "substantial effect" standard argued by the appellants is only one of two permissible standards for a viable cause of action, and this Court should not omit the standard which is easily gleaned from a strict reading of the act--the "in commerce" standard.

Using both of the standards referred to above in **McLain** is consistent with this Court's choice-of-law rules. For example, this Court has consistently held that "in tort cases, West Virginia courts apply the traditional choice-of-law rule, *lex loci delicti;* that is, the substantive rights between the parties are determined by the law of the place of injury." **W.Va. ex rel. Chemtall, Inc. v. Madden, 216 W. Va. 443, 607 S.E. 2d 772 (2004),** citing **Vest v. St. Albans Psychiatric Hospital, supra.** The "place of injury" requirement is compatible with both the "in commerce" and "substantial effect on commerce" standards: Did harm occur ***in*** West Virginia?

In contract cases generally, "the law of the state in which a contract is made and to be performed governs the construction of a contract." **Lee v. Saliga, 179 W.Va. 762, 373 S.E.2d 345 (WV 1988).** The above rule for contracts is comparable to the "in commerce" standard: Did the restraint occur ***in*** West Virginia trade or commerce? In insurance policy cases, this Court has more recently applied a test of the forum's *"significant relationship to the transaction and the parties"* in deciding the choice-of-law. **McKinney v. Fairchild International, Inc. 199 W. Va. 718, 487 S.E.2d 913 (WV 1997);** citing **Lee v. Saliga, supra.** This standard accommodates either or both the "in commerce" theory and the "substantial effect" theory. Thus, applying both standards, with only one required to prevail, is consistent with this Court's choice-of-law rules.

B. The appellants have *not* addressed the application of West Virginia insurance law which establishes that *West Virginia Unfair Trade Practices Act* [specifically West Virginia Code 33-11-3 and 33-11-4(4)] also governed Kevin Webb's antitrust claims.

The trade or commerce at issue in the appellants' "subject matter jurisdiction" argument is Kevin Webb's sales of insurance to Virginia residents, which as indicated below, occurred in West Virginia. By focusing primarily on the *West Virginia Antitrust Act*, the appellants have ignored an important statute which governed all of Kevin Webb's sales to Virginia residents:

> **"Compliance with chapter required.**
> No person shall *transact insurance in West Virginia* or relative to a subject of insurance resident, located or to be performed in West Virginia *without complying with the applicable provisions of this chapter.*"
> **West Virginia Code 33-4-1** (*emphasis added*).

Since Kevin Webb and the appellants transacted ***all*** insurance (even to Virginia residents) ***in*** West Virginia, the above statute required Kevin Webb and the appellants to not engage in any trade practice defined as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance pursuant to **West Virginia Code 33-11-3.** Included in the defined "unfair methods of competition, etc." prohibited by **West Virginia Code 33-11-3** is the following antitrust provision pertinent to Kevin Webb's claims:

> "*Boycott, coercion and intimidation.*- No person shall enter into any agreement to commit, or by any concerted action commit, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." **West Virginia Code 33-11-4(4).**

If Kevin Webb was required to comply with the West Virginia insurance statutes cited above when he sold insurance to Virginia residents, ***as a matter of law his claims MUST involve a restraint which is, or substantially affects, trade or commerce in West Virginia, or else he would not have been required to comply with the West Virginia insurance statutes.*** The "insurance business is quasi public in its character, and the state may, ...regulate it and all persons engaged in it." **State ex rel. Swearingen v. Bond, 96 W.Va. 193, 122 S.E. 539 (1924).**

A review of the second amended complaint establishes that Kevin Webb and Princeton Insurance Agency, Inc., alleged a cause of action under the *West Virginia Unfair Trade Practices Act* [specifically **West Virginia Code 33-11-4(4)]** in addition to the *West Virginia Antitrust Act.* [See Count II] Instructions of law were given establishing a basis for liability using the above cited statute; compare the statute to the following instruction of law to the jury:

> "Furthermore, if you believe from a preponderance of the evidence that those Defendants who were capable of concerted activity or of conspiring, concerted or conspired together and boycotted, coerced or intimidated the Plaintiffs and that such boycott, coercion or intimidation would tend to cause an unreasonable restraint of the *business of insurance* and that such boycott, coercion or intimidation resulted in the Plaintiffs losing their contracts with the Erie corporate and reciprocal Defendants, then you may render a verdict in favor of the Plaintiffs." [See instruction L.07. of the Circuit Court's Charge to the Jury] (*Emphasis added*)

The circuit court discussed that the *West Virginia Unfair Trade Practices Act*, and specifically **West Virginia Code 33-11-4(4),** should be read in *pari materia* with the *West Virginia Antitrust Act*, and that "the statutory prohibition against such conduct in the insurance code (**West Virginia Code 33-11-4(4))** may formulate the basis for an action under **West Virginia Code 47-18-3** ***given the latter prohibits all unlawful contracts, combinations and conspiracies in restraint of trade which would obviously include the former."*** [January 9, 2008, ORDER, pp. 2-4] Paragraph 25 of the second amended complaint alleges this theory.

The circuit court further noted that this Court had "*consistently permitted a private cause of action for those acts defined as unfair methods of competition...*" and that this Court has established that the *West Virginia Unfair Trade Practices Act* created a "***positive duty***" independent of any contract, and therefore a cause of action may be maintained based on the violation of the statutory duty. **Taylor v. Nationwide Mutual Insurance Company, 214 W.Va. 324, 589 S.E.2d 55 (2003)** [See the January 9, 2008, ORDER p.3] But, the circuit court also reasoned that a private cause of action was moot because of **West Virginia Code 47-18-9.**

C. When viewing the evidence in a light most favorable to Kevin Webb, his agency and sales were located and damaged only *in* West Virginia, and thus the restraint was "in commerce," and "substantially affected commerce," *in* West Virginia.

The appellants have failed to acknowledge that as an individual, Kevin Webb's business (including sales of insurance to Virginia residents) was located *in* West Virginia. The sales occurred *in* West Virginia. The appellants threatened to terminate (and they later terminated) his agency contracts to unlawfully restrain the insurance sales of State Auto/Princeton Insurance Associates *in* West Virginia. Kevin Webb's business was damaged *in* West Virginia, and therefore, his claim was actionable pursuant to **West Virginia Code 47-18-9**, which is this state's equivalent of the federal *Clayton Antitrust Act.* See **15 U.S.C. § 15.** Of course, **West Virginia Code 47-18-3(a)** is this state's equivalent of the federal *Sherman Antitrust Act* that is found in **15 U.S.C. § 1.** See **Kessel v. Monongalia General Hospital, supra.** The restraint of sales *in* West Virginia and the resulting damage to the business of Kevin Webb *in* West Virginia (including sales to Virginia residents), not only *"substantially affected"* trade or commerce *in* West Virginia, ***it restrained trade or commerce in West Virginia.*** Consider the following facts:

1. Kevin Webb's insurance sales, *even to Virginia residents*, occurred only in West Virginia because his agency was located only in West Virginia.

The Erie companies sent *one* letter to terminate all of the agency contracts; it proved that Kevin Webb's agency was located at the same physical location of Princeton Insurance Agency, Inc., 900 Mercer Street, Princeton, West Virginia. [Plaintiffs' Exhibit 27] There was ***no*** separate termination letter sent to Mr. Webb's "Virginia" agency because there was ***no*** Virginia agency!

Like the termination letter, there was only *one* agency review form for both Kevin Webb individually and Princeton Insurance Agency. [Plaintiffs' Exhibits 24, 25, 37] Those agency review forms state that Kevin Webb was the *"Principal Agent"* and most important, they state the following: ***"Total Office Locations: 1."*** There was ***no*** agency located in Virginia.

Insurance clients "*walked in off the street,*" "*came through the front door,*" and "*come to*" his agency where he made quotes and filled out applications with information obtained from each client. [T.R. 207, 209, 379-383] He described it as *"the"* agency, not as two. [T.R. 234]

The appellants stated to the circuit court that **ALL** Erie insurance policies (and this included those written for *Virginia residents*) were written through Princeton Insurance Agency, Inc. and its offices; its offices were only located at 900 Mercer Street, Princeton, West Virginia. This important fact was acknowledged by the appellants in their motion for summary judgment:

> **"Although *all* of the Erie insurance policies were written through *Princeton Insurance Agency and its offices*, Kevin Webb had separate agency agreements for authority to write in Virginia.** Under Virginia law, a corporation cannot enter into agency contracts, as it must be an individual. During the relevant time periods herein, Kevin Webb was also the president of Princeton Insurance Agency." [See ftnt 1 of the Defendants' February 21, 2007, Motion for Summary Judgment, ***emphasis added.***]

The above is significant. First, all policies of insurance, including those for Virginia residents, were written in West Virginia. Second, policies written, even for Virginia residents, were written *through* the offices of Princeton Insurance Agency, a West Virginia corporation licensed to sell insurance ***only*** in West Virginia. This was commerce *"in"* West Virginia.

A location only *in* West Virginia is corroborated by the management and termination of Kevin Webb. As an Erie agent, Kevin Webb was managed ***only*** by Mr. Fletcher, Mr. Olian, and the Parkersburg, West Virginia branch of the Erie insurance companies, and ***not*** any manager or branch in Virginia. [T.R. 465] ***The termination letter for Kevin Webb's individual agency contract was personally delivered to Kevin Webb at 900 Mercer Street in Princeton, West Virginia.*** [Plaintiffs' Exhibit 27; T.R. 403] *Even the Erie companies stated that Mr. Webb's policyholders would be non-renewed in accordance with* ***West Virginia Law*** *and service to those policyholders would be enforced under* ***West Virginia Law***. [Plaintiffs' Exhibit 27] Kevin

Webb was *paid* at Princeton Insurance Agency in Princeton, West Virginia, for his sales to Virginia residents. [T.R. 237; Plaintiffs' Exhibits 10, 11] All sales of Kevin Webb to Virginia residents were included into *one* report with sales of Princeton Insurance Agency to West Virginia residents.[Plaintiff's Exhibit 29] Telephone calls and e-mails were sent *to* Mr. Webb in Princeton, West Virginia, from Parkersburg, West Virginia. [Plaintiffs' Exhibits 15, 17, 20, 23, 39] When Mr. Webb's duties ended in June 2004, his renewed policyholders were managed only by the Parkersburg branch of the Erie companies, not a branch in Virginia. [T.R. 409]

2. Kevin Webb's agency contracts were based in West Virginia.

The evidence established that Kevin Webb was supposed to perform his agency contracts in West Virginia. He signed individual agency agreements *"in order to give (him) binding authority over on the Virginia side of* ***the*** *agency."* [T.R. 234, ***emphasis added***] "The agency" was singular, not plural. As indicated above, there was only one office location, not two. Mr. Webb was cross examined at trial and his testimony is informative to this Court about the location and performance of his personal agency contracts with the Erie companies:

> "Q. Now despite your testimony, when you filed a complaint in this matter, did you not allege that you were a captive agent with Erie Insurance Company?
>
> A. I think my attorney was making reference to the Virginia aspect of the claim, yes.
>
> Q. When he cited West Virginia law?
>
> A. He did, ***because the contracts was based through West Virginia."***
> [T.R. 456, 457, ***emphasis added***]

Kevin Webb was a resident of Mercer County, West Virginia, and this fact was admitted by the appellants in their answer(s) to the complaints filed. Since Kevin Webb was a West Virginia resident, he was required pursuant to **Va. Code 38.2-1836** to have a Virginia *nonresident* license to sell insurance to Virginia residents.

3. The injury to competition and the damages to Kevin Webb's business occurred *only* in West Virginia, not Virginia.

Since all sales of insurance occurred only in West Virginia, the restraint of those sales occurred only in West Virginia. Therefore, the harm to ***competition*** occurred in West Virginia.

Kevin Webb's business was damaged in West Virginia, and therefore, his private cause of action under **West Virginia Code 47-18-9** (the *Clayton Act* type claim), should be maintained in West Virginia. All commissions paid for policies sold by Kevin Webb, even those policies sold to residents of Virginia, "went to Princeton Insurance Agency." [T.R. 237] It was "one pot even though (Webb) had to be licensed on the Virginia side." [T.R. 237] This is consistent with all of the policies being written through Princeton Insurance Agency and its offices, as quoted above. It is also consistent with the commission statements introduced into evidence which were sent to Princeton Insurance Agency at P.O. Box 5488, Princeton, West Virginia. They illustrated commissions for property and casualty insurance paid by direct deposit, and commissions for life insurance paid by check. [Plaintiffs' Exhibits 10, 11] No commissions went to Virginia.

4. The acts to unlawfully restrain trade occurred in West Virginia, not Virginia.

The acts of the Erie insurance companies, Mr. Fletcher, and Mr. Olian to suppress competition with State Auto and Princeton Insurance Associates, and the acts of coercion, intimidation, and boycott of Kevin Webb and Princeton Insurance Agency occurred ***in*** West Virginia, not Virginia. Telephone calls and e-mails were sent to Princeton, Mercer County, West Virginia, from Parkersburg, West Virginia. [Plaintiffs' Exhibits 15, 17, 20, 23, 39] E-mails were sent within West Virginia from Charles Michael Fletcher to Carl Olian, and vice versa. [Plaintiffs' Exhibits 12, 14, 26] Personal visits with Kevin Webb on April 1, 2003, May 1, 2003, and October 15, 2003, were in Mercer County, West Virginia, either at Kevin Webb's office or at the Bob Evan's restaurant. [Plaintiffs' Exhibits 12, 13, 15, 16, 17, 26] Letters were sent to

Princeton, West Virginia from Parkersburg, West Virginia, and vice versa. [Plaintiffs' Exhibits 19, 27] Even the March 12, 2004, termination letter (Plaintiffs' Exhibit 27) was personally delivered to Kevin Webb at 900 Mercer Street, Princeton, West Virginia by Mr. Fletcher. [T.R. 403] None of the acts occurred in Virginia, since there was ***no*** agency in Virginia!

The above acts were acts "in commerce" in West Virginia, and those acts "substantially affected" commerce in West Virginia. When examining the venue statute for the *West Virginia Antitrust Act* quoted above, any one of those acts would grant venue to the Circuit Court of Mercer County, West Virginia. See **West Virginia Code, 47-18-15.**

D. The second amended complaint alleges a restraint of trade or commerce (insurance sales) only in West Virginia.

The second amended complaint of Kevin Webb and Princeton Insurance Agency, Inc., confined the restraint to trade or commerce (insurance sales) ***in*** West Virginia:

> "...the defendants by seeking the documents requested (and demanded) wanted to determine whether, and enforce that, ***the majority of the business going into the physical location of Princeton Insurance Agency, Inc., and Princeton Insurance Associates, Inc., was placed with the Erie corporate and reciprocal defendants, and not with State Auto Insurance Companies;*** in fact, agency relationships involving the sale of life insurance and the sale of insurance in Virginia were terminated even though the wrongfully requested documents ***involved only issues of property or casualty insurance sales for an agency in the state of West Virginia;"*** (See Plaintiffs' Second Amended Complaint, paragraph 22, pages 10 and 11, ***Emphasis added***).

The above paragraph in the complaint, which was incorporated into each count involving the antitrust violations, confined the restraint of insurance sales for an agency ***in*** West Virginia, and alleges that Kevin Webb's business was damaged because of it. Although the complaint also alleged the sale of insurance "in Virginia," the evidence cited above ***proved*** that the sales to Virginia residents occurred only in West Virginia. Even the appellants acknowledged that ***all*** policies were written in West Virginia.

III. THERE IS NO MATERIAL DIFFERENCE IN VIRGINIA LAW VERSES WEST VIRGINIA LAW, SO ANY POSSIBLE ERROR WOULD BE HARMLESS.

Both this Court and the United States Supreme Court have established that there can be no injury in the application of West Virginia law unless it conflicts in a material way with the law that the appellants have argued should apply: Virginia antitrust law. See **State ex rel. Chemtall, Inc. v. Madden, supra.,** citing **Phillips Petroleum Company v. Shutts , supra.** There are no material differences in the provisions of West Virginia law which were applied to this case versus the comparable provisions of Virginia law. For example, **Virginia Code 38.2-505** is identical to **West Virginia Code 33-11-4(4)**. In the antitrust acts, **Virginia Code 59.1-9.5** is almost identical to its West Virginia counterpart **West Virginia Code 47-18-3(a)**. The definitions found in **Virginia Code 59.1-9.3** are extremely similar, if not identical to, their West Virginia counterpart **West Virginia Code 47-18-2.** The provisions of **Virginia Code 59.1-9.17** are similar to **West Virginia Code 47-18-16** because both require courts to construe each state's act in harmony with judicial interpretations of comparable federal statutory provisions; the Virginia statute does not have a requirement of liberal construction. Finally, the provisions in **Virginia Code 59.1-9.12** are similar, but not identical, to the West Virginia counterpart **West Virginia Code 47-18-9** given that both provide for a private cause of action for individuals injured in their business as a result of a violation of the antitrust provisions. The Virginia version differs by allowing the finder of fact to treble compensatory damages if the conduct is willful, but there is no question that the conduct of the appellants was willful. ***The appellants agreed for the court, instead of the jury, to treble the compensatory damages and they requested the court to instruct the jury that it (the jury) was not to treble the damages, but that the court would do so.*** [T.R. 1199; see D.03B. of the Charge to the Jury] Knowing that the circuit court would treble the compensatory damages, *the jury still awarded $1,411,209.00 in punitive damages!*

IV. THE APPELLANTS SHOULD BE JUDICIALLY ESTOPPED FROM ARGUING: (A) THAT KEVIN WEBB HAD A "VIRGINIA" AGENCY AND (B) THAT THE *WEST VIRGINIA ANTITRUST ACT* DOES NOT GOVERN HIS CLAIMS.

(A) As stated above, the appellants represented to the circuit court that: **"... all of the Erie insurance policies were written through Princeton Insurance Agency and its offices..."** and the agency review forms for both Princeton Insurance Agency and Kevin Webb indicated only one office location. By stating the above, the appellants acknowledged that all policies, including those written by Kevin Webb for Virginia residents, were written at Princeton Insurance Agency which was located only in West Virginia. Now for the first time on appeal, the appellants claim that Kevin Webb had a "Virginia" agency. This is an inconsistent position, and as indicated from the evidence cited above from the record, it is not accurate. Kevin Webb's agency was located only in West Virginia, and he sold insurance to Virginia residents only there.

(B) The appellants advised the circuit court in their motion to dismiss filed May 11, 2005, that they were ***not*** seeking to dismiss Kevin Webb's individual claims even though that complaint, like the amended complaints, alleged antitrust violations based upon **West Virginia Code 33-11-4(4)**. When seeking to dismiss other individual plaintiffs for failing to state a claim upon which relief could be granted, the appellants stated the following to the circuit court:

> "The defendants are ***not*** asking the Court to dismiss the plaintiff Kevin Webb, individually, ***because Mr. Webb had a separate Agency Agreement with the defendants for business written in the state of Virginia."*** [See footnote 1 at page 3 of the Defendants' first motion to dismiss filed May 11, 2005, ***emphasis added***]

Although neither Kevin Webb nor Princeton Insurance Agency, Inc. alleged a violation of the *West Virginia Antitrust Act* in their original and first amended complaints, the allegations of antitrust violations under the *West Virginia Unfair Trade Practices Act* have always been included in each complaint, and have been specifically stated as **"COUNT II - VIOLATION OF WEST VIRGINIA CODE 33-11-4(4)."** Now for the first time on appeal, the appellants

argue that West Virginia antitrust law does not apply to Kevin Webb's claims. This includes both acts. (See appellants' brief, page 6, footnote 1.) ***The appellants even offered instructions of law from the West Virginia Antitrust Act, and never argued that the act could not be applied because Kevin Webb sold insurance to Virginia residents.*** The motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law were premised upon legal theories ***unrelated to the sales of insurance to Virginia residents.***

This Court has stated the circumstances under which a party may be judicially estopped:

> "Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." **Riggs v. West Virginia University Hospitals, Inc., 221 W.Va. 646, 656 S.E.2d 91 (2007)**

If the appellants were going to later argue on appeal that Kevin Webb had a "Virginia" agency, they should not have told the circuit court that *"all policies of insurance were written through Princeton Insurance Agency and its offices"* which were located only in West Virginia. Even more evidence of the fact that Kevin Webb's agency was located only in West Virginia could have been presented, ***but that fact was not contested.*** Furthermore, the parties and the circuit court could have litigated and decided during the proceedings below whether a different choice-of-law was appropriate, and if so, the complaint could have been amended and instructions of the appropriate law could have been given regarding Kevin Webb's claims. The application of West Virginia law was also ***uncontested.***

Although Kevin Webb expects to be bound by the application of West Virginia law, the appellants should be bound by it also because of their prior legal positions.

V. ANY ERROR IN THE APPLICATION OF THE *WEST VIRGINIA ANTITRUST ACT* WAS NOT PRESERVED FOR APPEAL AND HAS BEEN WAIVED.

Although subject matter jurisdiction may be raised for the first time on appeal, the application of the *West Virginia Antitrust Act* may ***not*** be raised for the first time on appeal. As stated above, without objection, the appellants offered instructions of law from the *West Virginia Antitrust Act.* [See Defendants' instructions: 13, 14, 15, 16, 17, 18, 19, 20, 21] Some of those jury instructions were given to the jury in the charge. [For example, see T.R. 1172, 1173]

This Court has stated that "as a general rule, no party may assign as error the giving of an instruction unless he objects thereto before the arguments to the jury are begun..." **Tracy v. Cottrell, 206 W.Va. 363, 524 S.E.2d 879, @ 892 (1999).** Since no objection was made to the instructions of law from the *West Virginia Antitrust Act,* and since the instructions of law from the *West Virginia Antitrust Act* have neither been incorporated as an assignment of error nor argued in the appellants' brief, the issue is waived. **Craighead v. Norfolk and Western Railway Co., 197 W.Va. 271, 475 S.E.2d 363 (1996); Lilly v. Taylor, 151 W.Va. 730, 155 S.E.2d 579 (1967); Rule 3(c)(3)** of the **West Virginia Rules of Appellate Procedure.**

CONSPIRACY, COMBINATION, OR CONCERTED ACTION

Both the *West Virginia Antitrust Act* and the *West Virginia Unfair Trade Practices Act* require some form of conspiracy, combination, agreement *or* concerted action between two or more individuals or entities for there to be a viable antitrust action. There were two forms which were actionable: (1) a conspiracy, combination, or concerted action between one or more of the Erie companies and Kevin Webb/Princeton Insurance Agency or (2) a conspiracy, combination, or concerted action between two or more of the Erie companies not wholly owned by a parent company. ***Proof of only one form of conspiracy or concerted action is all that was required.***

I. THERE WAS A CONSPIRACY, COMBINATION, OR CONCERTED ACTION BETWEEN ONE OR MORE OF THE ERIE INSURANCE COMPANIES AND KEVIN WEBB AND/OR PRINCETON INSURANCE AGENCY, INC.

The United States Supreme Court has established that the Erie insurance companies (defendants below) could act in concert, conspire, or combine with Kevin Webb or Princeton Insurance Agency (the plaintiffs below) for purposes of a cause of action under the *Sherman* and *Clayton Antitrust Acts*. **Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed. 2d 628 (1984),** *citing* **Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1891, 20 L.Ed 2d 982 (1968).**

In **Perma Life Mufflers**, the United States Supreme Court discussed the concept of a conspiracy, combination, or concerted action required to maintain an antitrust action. The Court held that *even assuming that the defendants were all a single entity, the plaintiffs could allege and prove a conspiracy or combination between themselves and the defendants,* and such would be sufficient to sustain a cause of action under the federal antitrust acts. Specifically, the Supreme Court stated in its opinion:

> "In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht v. Herald Co., 390 U.S. 145, 150, n.6 (1968); Simpson v. Union Oil Co., supra.,*" **Perma Life Mufflers, Inc. v. International Parts Corp., supra, @ 142, 1986, 992.**

The Supreme Court reversed the lower court's decision dismissing the case, and remanded same so that the petitioners were "permitted to rely on these alternative theories of conspiracy." **Perma Life Mufflers, Inc. v. International Parts Corp., supra.**

In **Copperweld**, the United States Supreme Court again ratified the concept of a conspiracy between defendants deemed as a single business unit with a plaintiff. After citing **Perma Life Mufflers**, the Supreme Court in **Copperweld** stated:

"But the Court noted immediately thereafter that ' in any event' each plaintiff could 'clearly charge' a combination between itself and the defendants..." **Copperweld Corp. v. Independence Tube Corp., supra, @ 766, 2739.**

The Supreme Court went on to state that in **Perma Life Mufflers,** the "intra-enterprise" (single entity) theory was at most only an "alternative holding." **Copperweld Corp. v. Independence Tube Corp., supra.**

A. The circuit court applied the Perma Life Mufflers and Copperweld theory of conspiracy, and instructed the jury accordingly.

The judiciary in West Virginia is directed to construe the *West Virginia Antitrust Act* in harmony with ruling judicial interpretations of the federal acts. **West Virginia Code 47-18-16; Kessel v. Monongalia County Gen. Hospital, supra,** citing **Gray v. Marshall County Board of Education, supra.** Consequently, the circuit court instructed the jury that the defendants could conspire with either or both plaintiffs. [Charge to the Jury, L.06.] The appellants don't dispute this legal theory, but they challenge the sufficiency of the evidence to prove it.

B. When viewing the evidence in a light most favorable to Princeton Insurance Agency, Inc., and Kevin Webb, there was sufficient evidence to support a conspiracy, combination, or concerted action between them and one or more of the Erie insurance companies.

The appellants raised this issue below, and the circuit court found that there was "substantial evidence to prove that the Plaintiff Kevin Webb, unwillingly, participated in a combination or conspiracy with the defendants to restrain trade." [January 9, 2008, Order, page 8] The appellants claim on appeal that the evidence did not support a "meeting of the minds" or "acquiescence," but the evidence clearly proved that Kevin Webb, under pressure to save his Erie contracts, shifted or "pushed" insurance sales away from State Auto to the Erie companies, in spite of higher Erie premiums. ***He also provided some information to confirm this shift!*** The following cited evidence proves the conspiracy between the Erie companies and Mr. Webb.

Carl Olian met Kevin Webb at his office on April 1, 2003, where the future of the agency was at issue because of the Erie companies' competition with State Auto (which had cheaper premiums) and Princeton Insurance Associates. [Plaintiffs' Exhibit 12] Mr. Webb originally provided alternative coverages and premiums offered by the relevant Erie companies and State Auto *so customers could make an informed choice.* [T.R. 258, 259, 261; Plaintiffs' Exhibit 12] Prior to May 1, 2003, the majority of the insurance business was sold to State Auto because of the conduct of former Erie branch manager, Jerry Murphy: this caused Mr. Webb to strictly apply the underwriting guidelines for the Erie companies that were raised in the AWARE program in February 2003, *which increased premiums.* [T.R. 258-261, 505, 506, 554, 857, 858] Customers wanted less expensive premiums and cancelled many Erie policies. [T.R. 854-858]

Mr. Webb met with Mr. Olian and Mr. Fletcher at his office on May 1, 2003, where the demand for increased production and the "relationship" between the Erie companies and Princeton Insurance Agency/Kevin Webb were discussed. [Plaintiffs' Exhibit 13; T.R. 268-271, 761, 762, 766, 767, 907] They asked Kevin Webb to *push* sales to the Erie companies and away from State Auto by "directing" or placing customers with the Erie companies, regardless of the *higher* premiums with the Erie companies. [T.R. 206, 261, 262, 384, 981, 988; Plaintiffs' Exhibit 12] In discussing State Auto's cheaper premiums with Carl Olian, Mr. Webb testified:

> ***"Particularly if there was a price difference he wanted me to put in the business with Erie, regardless. That was the message that I was getting from him..."*** [T.R. 262; ***EMPHASIS ADDED***]

Consequently, Mr. Webb placed his customers with the Erie companies, even with the more stringent guidelines and higher premiums, *unless* the customers complained or inquired of other companies, and *then* he would quote other companies. [T.R. 380, 381] ***The sales shifted dramatically in favor of the Erie insurance companies after the May 1, 2003 meeting.*** The

applications increased in May, June, and July to which Mr. Fletcher stated: **"Not bad..."** and the loss ratio for Princeton Insurance Agency and Kevin Webb dropped by eleven (11) points in just sixty-one (61) days from July 1, 2003 to August 31, 2003. [Plaintiffs' Exhibit 14; T.R. 850-853]

Under further threats of termination, Mr. Fletcher and the Erie companies demanded that Mr. Webb produce the production reports between Princeton Insurance Associates and State Auto so that they could see the production going to State Auto; this included new business off of the street and Rita Kidd's book of business brought from her former agency. [Plaintiffs' Exhibits 14, 15, 39; T.R. 287, 288, 925, 926, 1070, 1071] Rita Kidd instructed Kevin Webb ***NOT*** to produce the production reports for State Auto/Princeton Insurance Associates, so he did not produce them, ***but he did concede to the pressure by writing the production numbers down on a napkin at the Bob Evans' restaurant and sliding the napkin over to Mr. Fletcher.*** [T.R. 287, 602-604, 921, 922] Even with the production numbers, Mr. Fletcher still wanted the reports.

On December 16, 2003, Mr. Olian called Mr. Webb and said that without the reports, he would be hard pressed to convince the Erie companies that the ***"majority of that new business that walks into that door is not going to State Auto verses us;"*** Kevin Webb told him that ***"I give Erie what Erie asked for..."*** and then referring to the Bob Evans meeting with Mr. Fletcher, Kevin Webb said ***"And I had the numbers, I had the policies and showed him;"*** he further told Mr. Olian, ***"I give him the premium business that they asked for."*** [Plaintiffs' Exhibit 23; 368-371] At trial, Mr. Webb confirmed that the majority new business (off of the street and not Rita Kidd's prior book of business) went to the Erie companies. [T.R.287-289]

The evidence easily supports a "meeting of the minds" or "acquiescence" by Mr. Webb, who under the threat of termination, conspired with the Erie companies to suppress State Auto sales. He even produced State Auto sales information to Mr. Fletcher to try to convince him of it.

II. THERE WAS A CONSPIRACY, COMBINATION, OR CONCERTED ACTION BETWEEN THREE (3) OF THE ERIE INSURANCE COMPANIES WHO WERE SEPARATE ENTITIES NOT WHOLLY OWNED BY A PARENT COMPANY.

The second form of conspiracy, combination, or concerted action proven at trial was between three (3) of the Erie companies.

A. The "Copperweld" doctrine was applied.

In 1984, the United States Supreme Court addressed the issue of concerted action regarding the federal antitrust acts in **Copperweld Corp. v. Independence Tube Corp., supra.** Prior to the decision in **Copperweld**, the United States Supreme Court endorsed the legal concept that a parent and a wholly owned subsidary could conspire to violate the *Sherman* and *Clayton* antitrust acts. (See the history of the former doctrine in a case by case analysis in **Copperweld, supra @ pp 759 through 766, and pp 2735 through 2739**) But, in **Copperweld**, the Court stated that:

> "Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidary can, in a legal sense contemplated by section 1 of the Sherman Act, constitute a combination or conspiracy." **Copperweld Corp. v. Independence Tube Corp., supra @ 759, 2735.**

The Supreme Court went on to specifically confine its ruling in **Copperweld** as follows:

> "We limit our inquiry to the narrow issue squarely presented: whether a parent and a wholly owned subsidiary are capable of conspiring in violation of (section) 1 of the Sherman Act. *We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.*" **Copperweld Corp. v. Independence Tube Corp., supra @ 767, 2739.** *(EMPHASIS ADDED)*

The Supreme Court in **Copperweld** eventually ruled that a parent and a wholly owned subsidiary could *not* combine or conspire because they are essentially a single unit, stating that the *Sherman Act* "reaches unreasonable restraints of trade effected by 'contract, combination, ... or conspiracy' between ***separate entities."*** **Id. @ 768, 2740.** Therefore, since **Copperweld**, a

conspiracy, combination, or concerted action could occur between corporations or entities which are affiliated, *but are not parent corporations and wholly owned subsidiaries.* **Copperweld** is valid legal precedent today.

Since the West Virginia judiciary construes the *West Virginia Antitrust Act* in harmony with ruling judicial interpretations of the comparable federal acts, this Court adopted the **Copperweld** doctrine in **Gray v. Marshall County Board of Education, supra;** a parent and a *wholly owned subsidary* cannot conspire with each other since they are deemed a single firm.

The law before **Copperweld** was that all corporations, including a parent and a wholly owned subsidary, could conspire. Since the Supreme Court specifically confined the change in the rule of law in **Copperweld** to ***only*** eliminate a conspiracy between a parent and a wholly owned subsidary, *the current ruling judicial interpretations of the Sherman Act from the United States Supreme Court are that corporations which are **not** wholly owned by a parent corporation **can** conspire or act in concert.* Under this rule, three (3) of the Erie companies were capable of conspiring, but, at the request of the appellants, and over the objection of the Kevin Webb and Princetion Insurance Agency, the circuit court further instructed the jury that those three (3) Erie companies which were capable of conspiring *also had to be separate economic entities.* [See L.05 and L.08 of the Charge to the Jury.]

B. When viewing the evidence in a light most favorable to Princeton Insurance Agency and Kevin Webb, three (3) of the Erie companies were separate economic entities capable of acting in a conspiracy, combination, or concerted action to restrain trade.

The evidence established that Erie Family Life Insurance Company, Erie Insurance Exchange, and Erie Indemnity Company were capable of conspiring with each other because they did not fit the definition of a parent and wholly owned subsidiary. [Plaintiffs' Exhibits1-7] The following facts prove that each of those three companies were *separate economic entities.*

1. The Erie Indemnity Company was a ***publicly traded corporation;***

2. The Erie Family Life Insurance Company was a ***publicly traded corporation;***

3. The Erie Insurance Exchange was a Pennsylvania ***"reciprocal"*** company. No other Erie company could be more than a policyholder in the Exchange (it had no stock to own) and thus could not own more than a small, minority interest in it.

4. Erie Indemnity Company, Erie Family Life Insurance Company, and Erie Insurance Exchange did ***not*** file consolidated financial statements. Erie Indemnity claimed in its financial statements that it could ***not*** file a consolidated statement with Erie Exchange since it was ***not*** the "primary beneficiary" of the Exchange.

5. Erie Indemnity Company, Erie Family Life Insurance Company, and Erie Insurance Exchange were ***separately*** licensed with the insurance commissioner.

6. The property and casualty insurers were subject to separate and distinct legal regulation from the life insurance company under Pennsylvannia and West Virginia law. The reserves had to be maintained separate and distinct because ***life insurance reserves could not be used to pay property and casualty insurance claims, and vice versa.***

7. Erie Family Life Insurance Company paid its commissions by a totally separate means and by a separate accounting from the property and casualty insurers.

8. Erie Indemnity owned only 21.6% of the Erie Family Life, and thus could not be deemed as even a "parent" company to Erie Life.

9. Erie Indemnity was **NOT** the attorney-in-fact for Erie Exchange, but was the attorney-in-fact for the subscribing *policyholders* of Erie Exchange.

10. Mr. Fletcher and Mr. Olian were employees of ***only*** Erie Indemnity Company.

There was sufficient evidence for the jury to find that Erie Indemnity Company, Erie Insurance Exchange, and Erie Family Life Insurance Company were separate economic entities. This case involves insurance companies and insurance sales, which are highly regulated for the protection of the public. **State ex rel. Swearingen v. Bond, supra.** This case does not involve ordinary parent companies and subsidiaries which can combine assets and liabilities without any significant regulation as compared to the very strict regulation of insurance companies and insurance sales. The jury could fairly conclude that the property and casualty insurance companies had no "common" interest with the life insurance company, especially where Erie Indemnity did not even own 50% or more of it. The jury could fairly conclude that the "reciprocal" company was not a "single entity" with a publicly traded corporation. Whether the three (3) companies were *separate economic entities* was a question of fact found in favor of Kevin Webb and Princeton Insurance Agency, Inc., and there is no basis in the law to overturn it.

C. The Erie insurance companies which could conspire, combine, or act in concert with each other were *not* required to compete with each other.

The appellants argue that they do not compete with each other, and therefore, there can be no conspiracy, combination, or concerted action, citing **Copperweld**. The Supreme Court did ***not*** make that ruling. *The concerted action does **not** have to be between entities that compete with each other, but the concerted activity must be designed to restrain competition.* All that is required is a 'contract, combination, ... or conspiracy' between ***separate entities."*** **Copperweld, supra., @ 768, 2740, (emphasis added).** The United States Supreme Court confirmed that competition with each other is ***not*** required of the members of the conspiracy by ratifying the **Perma Life Mufflers** form of conspiracy described above at pages 32 and 33 of this brief.

In **Perma Life Mufflers,** the plaintiffs were franchisees and the defendants were franchisors, and they did not compete with each other, but their combination restrained

competition. As stated above, the Court held that the plaintiffs and defendants could conspire to violate the *Sherman Act* and such was actionable as of the date the plaintiffs unwillingly participated in the conspiracy. The **Perma Life Mufflers** and **Copperweld** Courts determined that even in the absence of competition with each other, separate economic entities may have a common interest in suppressing competition with yet another entity(s). Perhaps more compelling is that according to the **Perma Life Mufflers** Court, the "unwilling" co-conspirator is motivated mainly to prevent the "*termination*" of his contract, but it is his conspiracy with a defendant motivated to suppress competition, *that, in fact, suppresses competition.* For obvious reasons, the appellants are plainly wrong in their argument.

Although proving only one form of conspiracy, combination, or concerted action is required, Kevin Webb and Princeton Insurance Agency proved two forms.

HARM TO COMPETITION AND ANTITRUST INJURY

The appellants argue that the evidence is insufficient to support a finding that their conduct harmed competition. They correctly point out that the antitrust laws are designed to protect competition, not competitors: Was there an unreasonable restraint of trade or commerce? The appellants have not discussed that much of the charge to the jury consisted of instructions of antitrust law they presented, and that the key instructions regarding antitrust liability and damages were neither objected to below, nor are they presented as assignments of error on appeal. Frankly, those key instructions of law were from the West Virginia acts, and ruling case law. With the instructions of law, the jury affirmatively answered the following interrogatory: **"Do you find that the Defendants unreasonably restrained trade, in violation of the anti-trust laws, as given in the instructions of the Court?" "Yes."** The evidence clearly proved harm to competition and antitrust injury.

I. THE "McCREADY" CASE DEFINES ANTITRUST INJURY.

The concept of antitrust injury separates antitrust cases from ordinary cases. It is not enough to merely prove damages, but a plaintiff must connect the proven damages to misconduct which the antitrust laws were designed to prohibit--harm to competition.

In a case which originated in the United States District Court for the Eastern District of Virginia, the United States Supreme Court established the concept of what constitutes an antitrust injury. **Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed. 2d 149 [1982]** Before focusing on the majority's decision in **McCready,** it is most striking to understand that one of the more conservative members of the United States Supreme Court at that time, Justice Rehnquist, in his dissent in **McCready,** portrayed what the majority of the Court claimed to be an *"unrealistically narrow view of those injuries with which the antitrust laws might be concerned."* Please consider the *"narrow view"* of antitrust injury according to Justice Rehnquist in his dissent:

> "For example a group of retailers may threaten to refuse to do business with those distributors that continue to do business with a disfavored retailer. If the distributors agreed to cooperate with the conspiring retailers, then the disfavored retailer would have an action against the agreeing distributors and the conspiring retailers. [Citations omitted.] ***I would think that a distributor who refused to go along with the retailers' conspiracy and thereby lost the conspiring retailers' business would also have an action against those retailers. Such an action would be based upon the conspirators' concerted refusal to deal with the distributor which itself would be unlawful under the antitrust laws.*** Such an action, unlike the instant case, would not depend upon the anticompetitive effect of the challenged practice upon a third party. ***The distributor would have an action not on the ground that he was caught in the middle of an attempted boycott of participants on another level of the market, but because he was boycotted.*** The boycott of the distributor puts him at a competitive disadvantage to those distributors who are unaffected by the retailers' conspiracy and to those distributors who agree to participate." **[See Justice Rehnquist's dissent in McCready, Id, at page 490 (*Emphasis Added*)]**

The majority of the Court in **McCready**, authored by Justice Brennan, acknowledged that the concept of "antitrust injury" included not only what Justice Rehnquist stated in his dissent (as quoted above), but it was much broader. Consider the Supreme Court's analysis as follows:

> "But Justice REHNQUIST's dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint-beyond sheer *ipse dixit* -to help in determining what kinds of injury are not amenable to § 4 redress. **For example, the dissent acknowledges that "a distributor who refused to go along with the retailers' conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailers' business would ... have an action against those retailers," *post*, at 2554. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal.** *If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed."* **[See Footnote 21 of the body of the majority opinion in McCready, Id, @ page 484 (*Emphasis Added*)]**

Of course, given the internal procedures within the United States Supreme Court, Justice Rehnquist had the opportunity to respond to the majority's comment on his dissent in footnote 7 (of his dissent) wherein he recited as follows:

> "FN7 As pointed out by the Court, a concerted refusal to deal may take many forms....I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected." **[See Justice Rehnquist's dissent, footnote 7, McCready, Id, @ page 490]**

The United States Supreme Court has not reversed itself or in any way limited its holding in **McCready**. On October 15, 2007, after the trial of the case at bar, the United States Court of Appeals for the Fourth Circuit again ratified those valuable principles of law from **McCready**. In **Novell Incorporated, v. Microsoft Corporation, 505 F.3d 302 (4th Cir. 2007),** the United States Court of Appeals for the Fourth Circuit quoted an example from **McCready** (also quoted

above): *"If group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions."* **Id.@ nt 21.** Then the Court recited as follows:

> "...the Supreme Court has recognized that 'in enacting § 4[,] **Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.'** *See* ***McCready*, 457 U.S. at 472.** *The broad language of the statute, 'and the avowed breadth of the congressional purpose, caution [ ] us not to cabin § 4 in ways that will defeat its broad remedial objective.'* ***Id.* At 477."** **(See Novell, Id, emphasis Added)**

The above principles are consistent with the West Virginia Legislature advising the judiciary that the *West Virginia Antitrust Act* should be ***"liberally"*** construed and in harmony with decisions regarding the federal antitrust act. **Gray v. Marshall County Board of Education, supra, @ 755,** citing **West Virginia Code 47-18-16.**

II. WHEN VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO PRINCETON INSURANCE AGENCY AND KEVIN WEBB, THERE WAS AN ANTITRUST INJURY BECAUSE THERE WAS HARM TO COMPETITION.

In evaluating the sufficiency of the evidence, a comparable example of conduct deemed to be an unreasonable restraint of trade which caused harm to competition and antitrust injury is found in **Kessel v. Monongalia General Hospital, supra.,** where a United States Supreme Court decision is quoted:

> "An agreement which: narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs to violate Section 1 of the Sherman Act." **Kessel v. Monongalia General Hospital, supra,** citing **Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703, 85 L.E.2d 949 (1941).**

The above quotation cited in **Kessel** is remarkably similar to the facts in the case at bar. The Erie insurance companies harmed competition by restricting the "outlets" from which insurance sales could be made to insurance customers. Contrary to the argument of the appellants, it was not just the Erie insurance companies restricting the sales of their own products to customers by canceling the agency contracts of Princeton Insurance Agency and Kevin Webb. **The unreasonable restraint which harmed competition was the Erie insurance companies' conduct to compel Kevin Webb and Princeton Insurance Agency to restrain the sales of State Auto insurance policies to consumers through Princeton Insurance Associates so that the Erie companies would increase their sales!** The Erie insurance companies threatened a termination of the agency contracts with Kevin Webb and Princeton Insurance Agency *unless Kevin Webb caused a reduction in sales for State Auto and Princeton Insurance Associates (a separate agency from Princeton Insurance Agency) and ensured that the majority of the sales was placed with or "directed" to the Erie companies, and not State Auto.* ***Kevin Webb was instructed to place the sales with the Erie companies regardless of their higher premiums, and thus, insurance consumers paid higher premiums because of this restraint, while the Erie companies made greater profits.*** When the agency contracts were cancelled, many policyholders were *non-renewed* and lost their insurance coverage. The evidence proved that Kevin Webb ***"give Erie what Erie asked for"*** when he shifted insurance sales to the Erie companies away from State Auto/Princeton Insurance Associates. The 2003 premium volume increased for Erie. [See the citations from the record in this brief at pages 5-10, and 33-35]

Without objection, the jury was instructed of this legal theory. [Charge to Jury, § L.07]

Like a boycott, "threatened termination" of a contract to enforce compliance is actionable. **Perma Life Mufflers, Inc. v. International Parts Corp., supra, @ 142, 1986, 992.**

Just like the requirement to reveal "intimate details of their individual affairs" quoted above in **Kessel**, the Erie companies also demanded the State Auto production reports for *Princeton Insurance Associates* to establish compliance with the suppression of sales to State Auto and Princeton Insurance Associates in favor of the Erie companies. Kevin Webb secretly gave the appellants the State Auto production "numbers" on a napkin although he did not give them the "reports" because the reports had customer *confidential* information on them that could not be disclosed. [T.R. 276-287] Just like those who failed to comply with the Guild's program (restriction of sales and production of "intimate details of individual affairs"), Kevin Webb and Princeton Insurance Agency were threatened with a boycott, and later suffered a boycott (refusal to deal) when their agency contracts were terminated because the production reports were not produced. When viewing the evidence in a light most favorable to Kevin Webb and Princeton Insurance Agency, the restraint of trade, harm to competition, and antitrust injury is glaring.

While the agency contracts may permit the appellants under most circumstances to terminate Kevin Webb and Princeton Insurance Agency, the agency contracts cannot be terminated in violation of the antitrust acts, because as this Court has stated, the *West Virginia Unfair Trade Practices Act* creates a ***"positive duty"*** independent of any contract; therefore a cause of action may be maintained based on the violation of the statutory duty. **Taylor v. Nationwide Mutual Insurance Company, supra.** The *West Virginia Antitrust Act* also creates a ***"positive duty"*** and it has a statutory private cause of action. **West Virginia Code 47-18-9.**

THE DAMAGES AWARDED ARE NOT PRECLUDED

Consistent with the *Clayton Act,* **West Virginia Code 47-18-9** permits a private cause of action for persons or entities injured as a result of a violation of the act:

> "Any person who shall be injured in his business or property by reason of a violation of the provisions of this article may bring an action therefore..."

The statute makes reference to an injury to "business" or "property." Nothing in the statute prohibits claiming future lost profits, commissions, or market value of a corporation as damages. A business must necessarily be injured with lost profits, commissions, revenues, or value; how else could "business" be injured? In **Perma Life Mufflers, Inc. v. International Parts Corp., supra,** a plaintiff claimed damages from the cancellation of his contract by the defendants, *which according to the contract could be cancelled by either party with 30 days notice*, and the Supreme Court sustained the cause of action and remanded it for trial. ***If an insurance agency can be sold to a third party, or valued and divided in a divorce case, it can be damaged for purposes of recovery under the antitrust acts.*** [T.R. 205, 670, 671] If an insurance agent is killed in a car wreck from the negligence of another, his heirs may claim his lost future profits from commissions as damages-there is no reason to deny that damage in an antitrust case.

In wrongful or retaliatory discharge cases in West Virginia, parties may claim and be awarded damages for lost wages, even though they were *"employees at will"* and had no contractual right to employment or wages. **Harless v. First National Bank in Fairmont, 289 S.E.2d 692, 700 (W.V. 1982)** Why would there be any less of a right to recovery in an antitrust case with a statutory private cause of action? As the Supreme Court stated in an antitrust case:

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with the right of recovery for a proven invasion of the plaintiff's rights." **Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.E.652 (1946)**

Finally, the appellants argue that the damages are prohibited because of **Shrewsbery v. National Grange Mutual Insurance Company, 183 W.Va. 322, 395 S.E.2d 745 (1990).** The **Shrewsbury** decision involved a dispute between an insurance agent and an insurance company regarding the possible renewals of policies, the commissions, and the application of the

"expirations" provisions within the contract between the carrier and the agent. This Court stated the following major fact which distinguishes **Shrewsbury** from the case *sub judice*:

> "Mr. Shrewsbury does ***not*** contest National Grange's decision to end his agency with the company." [Id., p. 746 of the Southeastern Reporter, ***emphasis added***].

In essence, this Court determined in **Shrewsbury** that an insurance company could *not* tortiously interfere with a contract in which it was a party, and the agent could *not* claim tortious interference with a contract (insurance policies of consumers) in which the agent was *not* a party. Consequently, this Court did not decide whether Mr. Shrewsbury's agency contracts were *terminated in violation of any statutes, or whether his business suffered a damage which was actionable pursuant to* ***West Virginia Code*** *47-18-9.* The antitrust acts create a "*positive duty.*"

Princeton Insurance Agency and Kevin Webb ***do*** contest the termination of their agency contracts. Dan Selby provided a range of damages within *reasonable certainty.* [T.R. 667-691] **Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974)** The jury awarded compensatory damages within that range. The **Shrewsbury** case provides no legal precedent to the case at bar.

REQUEST

Princeton Insurance Agency, Inc., and Kevin Webb request this Court to in all respects **AFFIRM** the judgment of the Circuit Court of Mercer County, West Virginia.

PRINCETON INSURANCE AGENCY, INC. and KEVIN WEBB,

By Counsel.

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CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, Esq., Counsel for the Respondents, do hereby certify that the foregoing **Brief of the Appellees** was served upon W. Henry Jernigan, Jr., Esq., James D. Lamp and Matthew J. Perry, Esq., counsel for the Petitioners, by placing same in the U.S. Postal mail to the following addresses:

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